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No. 05-1448

IN THE

Supreme Court of the United States

JEFFREY H. BECK, Liquidating Trustee of the Estates of Crown Vantage, Inc. and Crown Paper Company,
Petitioner,

v.

PACE INTERNATIONAL UNION, EDWARD J. MILLER, and JEFFREY D. MACEK,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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STATUTES AND REGULATIONS

The text, in relevant part, of 29 U.S.C. §§ 1002 and 1341, and 29 C.F.R. § 4041.28 is set forth in the Appendix following this brief.

STATEMENT OF THE CASE

This matter arose during an insolvent employer's liquidation. Crown Vantage, Inc., maintained defined-benefit pension plans for its hourly employees represented by PACE International Union. Crown sold or closed all of its plants, so that its former employees had no prospects of future employment with Crown. Crown's Board of Directors then resolved to terminate the pension plans, and in order to facilitate the termination, merged twelve plans into one. During this process, a multiemployer defined-benefit pension plan known as PIUMPF offered to assume the benefit liabilities and assets of the merged pension plan.[1]

Initially, the Crown Board of Directors acknowledged that the PIUMPF offer "would be a favorable alternative," Joint Appendix ("J.A.") 94, and resolved on September 26, 2001, that the PIUMPF offer "will be evaluated in comparison to the annuitization of plans when we receive final bids from the annuity providers." J.A. 96. PIUMPF provided information to Crown for due diligence review. At a bankruptcy hearing on October 4, 2001, counsel for Crown assured the bankruptcy judge that the PIUMPF option was being considered and that before taking any action, Crown would present its proposed course of action to the court and give PACE an opportunity to comment. J.A. 87-89; Pet. App. 61. But five days later, when the Crown Board received annuity quotes that would leave approximately $5 million of surplus assets in the plans, it did an abrupt about-face. Giving no further con-

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[1] The multiemployer plan's full name is PACE Industry Union-Management Pension Fund.

sideration to the PIUMPF offer, and disregarding counsel's assurance to the court that Crown would present its proposed course of action for PACE's comment, the Crown Board spent more than $84 million of the plan's assets to purchase an annuity from the Hartford Life Insurance Company. Pet. App. 61.

PACE and two participants in the Crown hourly plan filed an adversary proceeding seeking to prevent the transfer of plan assets to Hartford. J.A. 9-29. They alleged that the failure to give serious consideration to the PIUMPF offer before deciding to purchase annuities was a breach of fiduciary duty under ERISA. Both parties presented evidence on this claim at a hearing November 29, 2001. On December 11, 2001, the bankruptcy judge found that the officers and directors of Crown "gave no serious consideration to the PIUMPF merger proposal." Pet. App. 62. The bankruptcy judge held that the decision to terminate the plan was a business decision, not subject to fiduciary duties, but that "discretionary actions taken to implement that decision" were subject to ERISA's fiduciary standards. *Id.* 65. "The decision whether to annuitize the plans or merge them into PIUMPF was such a discretionary act." *Id.* 66. Once the merger option was raised, "the Board had a fiduciary duty to fully explore it and determine which option was truly in the beneficiaries' best interests." *Id.* 65.

Turning to the question of relief, the judge noted that trying to unwind the annuity purchase could subject the plan to litigation with Hartford and a potential penalty of $4 million, and therefore entered an order that the assets left in the plan after the annuity purchase should be placed in an interest-bearing account pending final decision on the matter. *Id.* 66-67. The parties later stipulated that this preliminary order should be treated as a decision on the merits and further

stipulated that these assets would be distributed to plan participants if the order were affirmed on appeal. *Id.* 78-80.[2]

Crown appealed the order to the district court, which affirmed on January 10, 2003. *Id.* 29. It then appealed to the Court of Appeals, and the Court of Appeals affirmed on October 24, 2005. *Id.* 1. The only issue raised in the petition for certiorari is whether the Crown Board's failure to give serious consideration to PIUMPF's offer was a breach of fiduciary duty under ERISA.

SUMMARY OF ARGUMENT

Fiduciary duty. The two basic principles underlying the Court of Appeals' decision that the administrator of the terminating Crown plan was obligated to give serious consideration to the proposed merger of the Crown plan into PIUMPF, are beyond dispute: 1) An employer's decision to terminate a pension plan is not a fiduciary decision as defined by ERISA; and 2) when a plan administrator makes a decision on how to implement a plan termination, that decision must be carried out in accordance with ERISA's fiduciary duties, including the duty of loyalty, under which the administrator may act only in the interest of the plan's participants and beneficiaries.

Deciding on a method for disposition of a terminating plan's assets and for providing the plan's benefit liabilities, as the Court of Appeals held, is part of the process of implementing the termination. To the extent that the plan administrator is given authority under the plan document to make such a decision, the administrator exercises both "discretionary responsibility in the administration of such plan" and

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[2] The amount of surplus assets was later reduced by approximately $1.8 million when Hartford required another premium payment to cover some of the plan's benefit liabilities that had been overlooked in the initial bidding for the annuity. *See* Bankr. Dkt. 1641-46, 1656, 1664.

"authority or control respecting . . . disposition of its assets" and thus satisfies two distinct subparts of the ERISA definition of fiduciary. This conclusion is also in accord with the law of trusts, under which (as this Court has stated) distributing a trust's assets on termination was part of "the common law trustee's most defining concern historically . . . ." *Pegram v. Herdrich*, 530 U.S. 211, 231 (2000).

In the circumstances of this case, the Court of Appeals decision is fully consistent with cases cited by Petitioner and *amici* holding that plan mergers and transfers of liabilities and assets are outside ERISA's definition of fiduciary decisions because they change the design, structure, or composition of a plan. All of those cases involved transactions between ongoing plans, where employees would accrue future benefits under a different benefit scheme and where the employer's obligations to the ongoing plan would change. In this case, the liquidating employer was no longer in existence, and employees' benefits were fully accrued and protected. The design, composition and structure of the terminating pension plan, as the Court has used those terms, could not be changed by the proposed merger.

Merger as a Method of Implementing Plan Termination. 29 U.S.C. § 1341(b)(3)(A) expressly permits a plan administrator to decide between purchasing an annuity contract or "otherwise fully provid[ing] all benefit liabilities under the plan." That language, at the very least, authorizes a plan administrator to use a method of distributing assets and providing for benefit liabilities that is the legal equivalent of purchasing an annuity contract. A merger of a terminating single-employer plan into a multiemployer plan is such a legal equivalent. Although Petitioner and the government cite words and phrases out of context from § 1341 to argue that merger is not permitted under that section, their arguments founder on the fundamental fact that merger, in which the terminating plan's assets would be transferred to the

multiemployer plan in exchange for the multiemployer plan's assumption of all the benefit liabilities, would "distribute" the terminating plan's assets and "fully provide all benefit liabilities under the plan" in just the same way that Congress expected that annuities would satisfy those requirements.

The merger of a terminating plan into a multiemployer plan would also be consistent with applicable regulations. The PBGC's current regulation under § 1341, echoing the statute, authorizes the distribution of assets either through purchase of annuities or "in another permitted form." 29 C.F.R. § 4041.28(c)(1). The government concedes that this regulation would permit a distribution in some form other than annuities, lump sum cash distributions or rollovers, but cannot give even one example of what another permitted form would be, if not a transfer of assets and liabilities that is the legal equivalent of purchasing an annuity contract. Gov't Br. at 23. The government's assertion that mergers are not permitted is nothing more than a litigating position, offered without attempting to explain its inconsistency with PBGC's prior regulatory actions: 1) Opinion Letter 85-25, in which PBGC concluded that a transaction identical for all purposes to what PIUMPF proposed in this case could be accomplished by a transfer of assets and liabilities to a multiemployer plan followed by a reversion to the employer of excess assets in the single-employer plan, without purchasing annuities; and 2) the PBGC's 1997 revision of the regulation in question—in which the agency substituted the authorization for "another permitted form" in the place of a former requirement that annuities be purchased for almost all benefits that a plan would have provided in annuity form. Under *Gonzales v. Oregon*, 546 U.S. 243, 126 S. Ct. 904 (2006), and *United States v. Mead Corp.*, 533 U.S. 218 (2001), the government's current interpretation of its regulations is not entitled to deference and should not be followed.

ARGUMENT

The Court of Appeals ruled on the two questions posed by this case, as follows: First, that the selection of a method to implement an employer's decision to terminate a defined benefit pension plan is a fiduciary decision[3] and if a proposed merger of the terminating plan into a multiemployer plan is on the table as one of those methods, it must be faithfully investigated in the interest of the terminating plan's participants; and, second, that 29 U.S.C. § 1341(b)(3)(A) and the regulations issued thereunder, which govern standard pension plan terminations, allow a plan to effectuate such a termination through a merger of the plan into a multiemployer pension plan.

Each of those Court of Appeals rulings is correct and both should be affirmed by this Court, as we now show. In part one of the argument that follows, we set out the basic operational and transactional context from which this case arises. In part two we show that the Court of Appeals "fiduciary decision" ruling is correct. And in part three we show that the Court of Appeals ruling that the proposed merger was a lawful method to implement the termination is equally correct.

I. THE OPERATIONAL AND TRANSACTIONAL CONTEXT OF THIS CASE

The pension plans involved in this case are defined benefit plans. Such plans promise a fixed level of benefits to employees who qualify for such benefits under the terms of the plan. No participant has a claim to any assets of the plan, but only to the defined level of benefits that the plan

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[3] If the Court of Appeals' discussion of the issue seems cursory, it was in direct proportion to Petitioner's briefing, in which less than two pages of argument was devoted to the question. Br. for Appellant at 18-19, *Beck v. Pace Int'l Union, et al.*, case nos. 03-15303, 03-15331 (9th Cir. 2005).

promises. *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 440 (1999).

The Crown plans that were terminated here were single-employer pension plans. In such plans the employer may act in a dual capacity, as both settlor and plan administrator. *Varity Corp. v. Howe*, 516 U.S. 489, 498 (1996). When performing settlor functions the employer is free to make decisions for the sole purpose of furthering its business interests, but when acting as plan administrator in a capacity that ERISA defines as fiduciary, the employer must comply with ERISA's fiduciary duties. *Pegram v. Herdrich*, 530 U.S. at 225. Those fiduciary duties include acting "solely in the interest of the participants and beneficiaries . . . ." 29 U.S.C. § 1104(a)(1).

PIUMPF is a multiemployer pension plan. Multiemployer plans, by definition, are maintained pursuant to collective bargaining agreements between a union and two or more unaffiliated employers. 29 U.S.C. § 1002(37). "Such plans, commonly known as 'Taft-Hartley' plans, . . . are the product of joint negotiation between employers and a union representing employees and are administered by trustees nominated in equal numbers by employers and the union." *Connolly v. PBGC*, 475 U.S. 211, 232 (1986). While employers typically contribute to multiemployer plans at a negotiated rate for each hour or day of work performed by covered employees, *see, e.g., Walsh v. Schlecht*, 429 U.S. 401, 404-06 (1977), because Crown was in liquidation, PIUMPF's proposal did not contemplate any obligation for Crown to make future contributions to the multiemployer plan. That proposal contemplated instead that PIUMPF would assume full liability for the benefits that Crown employees had earned under the Crown plans, in exchange for a one-time transfer of assets sufficient to fund those liabilities. Pl. Ex. 25 at 4 (Bankr. Ct. Hr'g Nov. 29, 2001), Bankr. Dkt. 22 at 56, 89. The benefits that Crown employees

had earned would not be reduced in connection with that transaction. *Id.* at 5. Nor would Crown employees accrue any additional benefits in the future under PIUMPF unless they worked for another contributing employer. If so, they would accrue benefits on the same terms that applied to other employees of that contributing employer. *Id.* at 4. That ability to accumulate benefits in one plan based on service with different employers—known as "portability"—is one of the advantages of multiemployer plans for participants. *See* Multiemployer Pension Plan Amendments Act of 1980, H. Rep. No. 96-869(I), at 53 (1980), *reprinted in* 1980 U.S.C.C.A.N. 2918, 2921.

Transactions between defined benefit pension plans like the one proposed here are common, most frequently in ongoing plans. For example, in connection with a corporate acquisition, the parties may transfer assets and liabilities from the selling company's pension plan to the acquiring company's plan, or merge two plans. *See, e.g., Flanigan v. General Elec. Co.*, 242 F.3d 78 (2d Cir. 2001); *Brillinger v. General Elec. Co.*, 130 F.3d 61 (2d Cir. 1997). A selling company may split its plan into two plans in order to facilitate such a transfer—a "spin-off." *See, e.g., Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998). Following such a spin-off, one of the new plans may be merged into the plan of the acquiring company—a "merger-spin-off." *See* 26 C.F.R. § 1.414(*l*)-1(o). Multiemployer plans likewise are commonly involved in mergers and transfers of assets and liabilities from and to other plans.

The principal limit that ERISA places on all of these transactions is that the benefits to which participants are entitled cannot be lower immediately after the transaction than they were immediately before the transaction. 29 U.S.C. § 1058(d) (applicable to single-employer plans); *id.* § 1411(b)(2) (applicable to transactions between multiemployer plans); *id.*

§ 1412(b) (applicable to transactions between single-employer and multiemployer plans).

Plan mergers and transfers of assets and liabilities also commonly occur in the context of plan terminations. For example, in this case, Crown merged twelve of its hourly employee pension plans to facilitate the termination that the employer was planning. Pet. App. 31-32. Other transactions occur as "spin-off terminations," where assets and liabilities are spun off to create a new plan and the remainder of the original plan is terminated. *See* 29 C.F.R. § 4041.23(c). Similarly, assets and liabilities may be transferred to an existing plan, leaving the original plan to be terminated. *See generally* E. Thomas Veal & Edward R. Mackiewicz, *Pension Plan Terminations* 164-74 (2d ed. 1998).

In this case, PIUMPF's proposal was described variously as a "merger," as a "transfer of assets and liabilities," or as PIUMPF "taking in" or "taking on" the Crown hourly plans.[4] In the context of termination of the single-employer plan, all of those terms mean the same thing. A transfer of benefit liabilities and assets from the Crown plan to PIUMPF is the same as a merger of a plan containing those liabilities and assets into PIUMPF. IRS regulations governing transactions between single-employer plans provide that any transfer of assets and liabilities from one plan to another is "considered as a combination of separate mergers and spinoffs . . . . Thus, for example, if . . . a block of assets and liabilities are transferred from Plan A to Plan B, each of which is a defined benefit plan, the transaction will be considered as a spinoff

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[4] Although most of the briefing in the courts below used the term "merger," the Respondent's brief to the Court of Appeals also characterized the proposed transaction as a transfer of assets and liabilities. Br. for Appellee at 20, 23, 28-29, 32, 33, *Beck v. Pace Int'l Union, et al.*, case nos. 03-15303, 03-15331 (9th Cir. 2005). The Petitioner's Reply Brief did not take issue with the accuracy of that characterization of the proposed transaction.

from Plan A and a merger of one of the spinoff plans with Plan B." 26 C.F.R. § 1.414(*l*)-1(o). The principle is the same when a multiemployer plan is involved. Accordingly, the use of the term "merger" did not preclude structuring the transactions as a transfer of assets and liabilities to PIUMPF followed by formal termination of the Crown plan. Nor, as discussed at 39-40, *infra,* would it have precluded a reversion of any surplus assets to Crown in connection with the termination.

Against this background, Petitioner has not argued, and does not argue, that its decision to implement the termination of the Crown plans by purchasing an annuity, without serious consideration of PIUMPF's proposal, was a decision that satisfied ERISA's fiduciary standards. Rather, Petitioner argues only that the decision was not subject to ERISA's fiduciary standards and that, if it was subject to fiduciary standards, the proposed merger was not a legally permissible means of implementing a plan termination. Accordingly, if the decision was subject to ERISA's fiduciary standards and if merger was a legally permissible means of implementing the termination, the decision of the Court of Appeals is entitled to affirmance.

II. DECISIONS ON THE METHOD OF IMPLEMENTING A PLAN TERMINATION ARE SUBJECT TO ERISA'S FIDUCIARY STANDARDS AS LONG AS THEY ARE WITHIN THE SCOPE OF AUTHORITY PROVIDED IN THE PLAN DOCUMENTS

A. The statutory definition of fiduciary makes the decision on disposition of plan assets on termination a fiduciary decision.

The definition of "fiduciary" is the starting point for deciding every question as to whether a decision affecting a plan is

subject to ERISA fiduciary standards. That definition, in 29 U.S.C. § 1002(21)(A), provides that

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

The decision on the method for implementing a plan termination is a fiduciary decision under two distinct subparts of this definition. One is subpart (iii)—"discretionary authority or discretionary responsibility in the administration of such plan." The other is subpart (i), which includes "any authority or control respecting . . . disposition of [the plan's] assets."

1. Implementation of a decision to terminate is plan administration.

This Court has issued several decisions interpreting the plan administration subpart of the definition. In those decisions, the Court has described a plan sponsor's decision that a plan should be terminated as a business decision analogous to decisions made by settlors under trust law, and not part of plan administration. *Hughes Aircraft Co.*, 525 U.S. at 443; *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996); *Varity Corp.*, 516 U.S. 489 (1996); *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 78 (1995).

Once a decision to terminate has been made, however, a variety of decisions are necessary to implement the termination. The most critical part of implementation is the decision on how to dispose of the plan's assets for the purpose of providing benefit liabilities. Most commonly this disposition of assets is accomplished by arranging with an insurer for the

purchase of a group annuity contract to substitute for the benefit obligations of the plan. The Department of Labor and the PBGC have long interpreted ERISA to provide that the selection of an insurer for this purpose is a fiduciary function and must be performed prudently and in the best interest of participants and beneficiaries. *See Waller v. Blue Cross of California*, 32 F.3d 1337, 1343 & n.12 (9th Cir. 1994).

No one in this case questions the validity of that interpretation. In the 1980s, contemporaneous with the DOL's adoption of its interpretation, the Executive Life Insurance Company and others were capturing a large share of the market for group annuities by quoting low annuity prices that gave large reversions to employers. Those insurers were able to quote low prices because their underwriters assumed that the insurers' risky investment portfolios would continue to yield high returns. General Accounting Office Report No. 93-29, Private Pensions: Protections for Retirees' Insurance Annuities Can Be Strengthened 12-13 (Mar. 1993). When this aggressive strategy failed, several insurance companies collapsed, and large numbers of participants whose pension plans had purchased the low-priced annuities lost a large part of their pension benefits. *Id.* at 10, 13. DOL adopted an interpretation of ERISA's fiduciary standards for the purpose of reducing the risk of such losses. Interpretive Bulletin, 60 Fed. Reg. 12328 (Mar. 6, 1995). It stated that implementation of a plan termination requires selection of an insurer based solely on the interests of participants in the security of their benefits, and not in the interest of obtaining the largest reversion for the employer. *Id.* at 12328-12329. *See also* 29 C.F.R. § 4041.28(c)(3) (PBGC regulation). The courts have similarly concluded that selection of an annuity to implement plan termination is a fiduciary decision under ERISA. *See, e.g., Waller*, 32 F.3d at 1342-44; *Bussian v. RJR Nabisco, Inc.*, 223 F.3d 286, 295-98 (5th Cir. 2000).

The government argues, however, that only a choice *among* annuity providers is a fiduciary decision under ERISA. Gov't Br. at 17. The government suggests that this decision is different from all the other decisions on how to implement a termination "because it involves a discretionary choice about how to expend plan assets" and because ERISA "assigns responsibility for the decision to the plan administrator." *Id.* That assertion refutes itself. First, the choice of a method to implement termination, within the scope of authority granted by the plan document, is equally a discretionary decision about how to expend plan assets. Second, it is not just the selection of a particular insurer that ERISA assigns to the plan administrator. Section 1341(b)(3)(A) expressly charges the "plan administrator" in a terminating plan with the broader responsibility to provide benefit liabilities to participants by either (i) purchasing an annuity, or (ii) otherwise fully providing for the liabilities. In *Varity v. Howe*, the Court found it highly significant, in concluding that communicating to plan participants about their benefits was fiduciary in nature, that Congress assigned to the plan administrator the task of distributing information about a plan, such as summary plan descriptions. 516 U.S. at 502. Similarly, by assigning to the plan administrator in § 1341 the task of making determinations as to the final disposition of a terminating plan's assets, Congress showed that it understood that task to be administrative, and hence, fiduciary in nature. [5]

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[5] The government urges the Court to draw significance from the fact that 29 U.S.C. § 1411, which governs mergers between multiemployer plans, assigns the functions under that section to the "plan sponsor." This, according to the government, suggests that Congress likewise considered a decision whether to merge a single-employer plan into a multiemployer plan to be a "plan sponsor" decision. Gov't Br. at 17. There are two reasons why this argument should be rejected. First, 29 U.S.C. § 1412—which specifically governs merger of a single-employer plan into a multi-employer plan—does not assign similar functions to a "plan sponsor." Second, mergers of ongoing plans, such as § 1411 encompasses, may nor-

2. Implementation of plan termination also requires disposition of the plan's assets.

This Court has regularly consulted the common law (including what were once the distinct rules of equity) to understand the background against which Congress defined fiduciary obligations under ERISA. *E.g., Pegram,* 530 U.S. at 224. Based on that common law, the Court has recognized that the decision on how to distribute a trust's assets, both routinely and upon termination, was a traditional responsibility of the fiduciary:

> At common law, fiduciary duties characteristically attach to decisions about managing assets and distributing property to beneficiaries. See Bogert & Bogert, Law of Trusts and Trustees §§ 551, 741-747, 751-775, 781-799; 2A Scott §§ 176, 181; 3 *id.*, §§ 188-193; 3A *id.* § 232. Trustees buy, sell, and lease investment property, lend and borrow, and do other things to conserve and nurture assets. They pay out income, choose beneficiaries, *and distribute remainders at termination.* Thus, the common law trustee's most defining concern historically has been the *payment of money in the interest of the beneficiary.*

Pegram, 530 U.S. at 231 (emphases supplied).

This "most defining concern," *id.*, of the common law trustee is reflected in the ERISA definition that includes as a fiduciary decision "control or authority respecting . . . the disposition of assets." 29 U.S.C. § 1002(31)(A)(i). When the settlor has decided that a plan is to be terminated, it falls to the plan administrator, acting in a fiduciary capacity, to decide on the disposition of plan assets. This decision is squarely within the duties of a trustee at common law upon termination of a trust:

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mally be plan sponsor decisions, *see infra* at 19-21, but the merger here, as a method of implementing plan termination, is governed by the specific plan termination provision of § 1341.

> At such time when the trust is terminated in any way, whether by the expiration of its fixed term or by revocation or court decree or otherwise, the trust nevertheless continues for a reasonable time during which the trustee has power to perform *such acts as are necessary to the winding up of the trust and the distribution of the trust property as are expressly given or reasonably implied from the trust instrument.* The trustee has the duty to carry out this phase of trust administration with reasonable care and prudence.

George G. Bogert & George T. Bogert, *The Law of Trusts and Trustees*, § 1010, at 448-50 (rev. 2d ed. 1983) (emphasis supplied).

3. In both cases the scope of the fiduciary's authority depends on the terms of the plan.

Petitioner and *amici* here argue that grave and serious consequences will result from the Court of Appeals' ruling that the decision of how to implement a plan termination is a fiduciary decision. All of their concerns are unfounded, because an employer can limit the decisions a plan administrator can make by limiting the authority that the plan document grants to the administrator.

Neither the statute nor the common law gives a plan administrator or trustee the power to disregard the plan document when administering the plan or deciding how to dispose of plan assets. ERISA is very clear that a plan administrator must discharge his duties "in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [Title I] and [Title IV]." 29 U.S.C. § 1104(a)(1)(D). If the plan document contains limits on how a termination will be implemented, and if those limits are consistent with Titles I and IV of ERISA, a decision contrary to those limits is not within the plan administrator's discretion in the administration of the plan nor is it within his "control or authority" over the

disposition of plan assets. Similarly, as the passage from Bogert, *Law of Trusts and Trustees*, quoted at 15 *supra*, states, a trustee's powers in winding up the trust must be "expressly given or reasonably implied from the trust instrument."

In this case, the district court held that the plan document governing the Crown plan permitted merger into a multiemployer plan as a means of terminating the plan. Pet. App. 47. The Court of Appeals declined to review that holding because Petitioner had not raised it in the bankruptcy court and therefore waived it. Pet. App. 10. Petitioner does not seek review of that holding here, and for purposes of this Court's review, the plan document allowed the plan administrator to implement the sponsor's termination decision through a merger of the plan into PIUMPF.

If, instead, the plan sponsor had amended the plan to provide that plan termination had to be implemented through the purchase of an annuity contract, the plan administrator would have been bound to follow that plan provision unless it was inconsistent with Title I or Title IV of ERISA. And it is clear that there is no such provision that is even arguably inconsistent with a plan rule requiring the purchase of annuities on plan termination. As we discuss in detail in Part III of this brief, 29 U.S.C. § 1341 permits the plan administrator to use annuities or other means of distributing a plan's assets on termination, as long as those other means are "in accordance with the provisions of the plan." *Id.* § 1341(b)(3)(A)(ii). That section would permit a plan sponsor to adopt a plan provision that withdraws from the plan administrator any authority or control to dispose of the plan's assets by a means other than an annuity purchase. Thus, if a plan sponsor does not want to allow the liabilities and assets in the plan at the time of termination to be merged into a multiemployer plan, the plan sponsor can foreclose such an outcome by adopting a clear plan provision.

Similarly, if the plan sponsor wants to make certain that it can obtain a reversion of any excess assets (if assets remain after the plan administrator has provided for the benefit liabilities in accordance with fiduciary standards), the plan sponsor can adopt plan provisions that will require a reversion in those circumstances.[6] Reversions are not restricted to terminations in which the plan administrator purchases annuities. As we discuss in detail *infra*, 39-41, PBGC has recognized that reversions are possible when a terminated plan's benefit liabilities are transferred to another plan.[7]

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[6] We would note that the arguments of Petitioner and the government that any rule that could make reversions more difficult would be contrary to the policy of ERISA are unsound. Congress has not favored employer reversions but has merely permitted them under limited circumstances. *See, e.g.*, 26 U.S.C. § 4980 (imposing an excise tax of 20% or 50% on any reversion); H. Rep. No. 100-391(II) at 1002, *reprinted in* 1987 U.S.C.C.A.N. 2313-378, 2313-619 "[The [Ways and Means] Committee does not believe that it is appropriate to expand the situations in which an employer may obtain a reversion. To do so runs the risk that employers would use pension plans as a tax-deferred savings account rather than as a retirement system.")

[7] In this particular case, Petitioner and the government assert that because PIUMPF's proposal called for all of the Crown plan's assets to be transferred, Crown would have been deprived of a possible reversion if the proposal had been accepted. Pet'r Br. at 33-34; Gov't Br. at 20. If Crown had amended the plan to provide that the termination could be implemented only through a method that transferred no more assets than were required to fund the liabilities, the plan administrator could have proceeded with the merger only if PIUMPF were willing to accept assets equal to the value of the liabilities. Because the record shows that PIUMPF had previously offered to accept all of Crown's hourly employee plans—including five other plans that were underfunded—it is reasonable to assume that it would have been willing to accept the twelve better-funded plans on terms that would leave assets for a reversion to Crown. Tr. of Proceedings, Bankr. Ct. Dkt. 22 (Nov. 29, 2001), at 88:22-24; 100:23-101:2, 126:10-12. Any uncertainty on this point in the record is due entirely to Crown's abrupt action cutting off consideration of a PIUMPF merger instead of exploring it fully.

B. The proposal to implement the termination through merger was not exempt from ERISA's fiduciary standards because of any effect on plan design or structure.

Petitioner and the government argue that a decision to merge the Crown plan into PIUMPF cannot be an ERISA fiduciary decision because it would be a decision on changing "plan design" or "structure," and this Court's prior decisions have described decisions on changing plan design or structure as settlor decisions, Pet'r Br. at 16-17; Gov't Br. at 15. This argument misapprehends the Court's precedents, both as a matter of law and as that law applies to the undisputed facts of this case.

This Court has not purported to create a "settlor function" rule independent of ERISA's definition of fiduciary, but has simply identified functions that are not encompassed within that definition. In *Lockheed Corp. v. Spink*, 517 U.S. at 890, the Court summarized the decision in *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73 (1995), and said: "This rule is rooted in the text of ERISA's definition of fudiciary. . . . As the Second Circuit has observed, 'only when fulfilling certain defined functions, including the exercise of discretionary authority or control over plan management or administration,' does a person become a fiduciary . . . ." 517 U.S. at 890 (quoting *Siskind v. Sperry Ret. Program, Unisys*, 47 F.3d 498, 505 (2d Cir. 1995)). If a function is encompassed by the ERISA definition, the person performing it must comply with the fiduciary standards; if the function is outside that definition, the standards do not apply.

Here, the authority to select a method for implementing termination by disposition of plan assets is squarely within the ERISA definition of fiduciary. The arguments made by Petitioner and the government would require the Court to carve out an exception from that definition whenever the exercise of that authority could also be described as having an

effect on plan composition, design or structure. The definition supports no such exception.

In any case, even if certain plan mergers proposed as a method of implementing a termination could be taken outside the fiduciary definition because of some effect on plan composition, design or structure, the proposed merger in this case cannot be such an exception.

In *Hughes Aircraft v. Jacobson* the Court elaborated on the meaning of a change in the composition, design, form or structure of a plan:

> In general, an employer's decision to amend a pension plan concerns the composition or design of the plan itself and does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets. . . . ERISA's fiduciary duty requirement simply is not implicated where Hughes, acting as the Plan's settlor, makes a decision regarding the form or structure of the plan *such as who is entitled to receive plan benefits and in what amounts, or how such benefits are calculated.*

525 U.S. at 444 (emphasis supplied). The critical point here is that the proposed transaction with PIUMPF would *not* have changed the Crown plan of benefits in any respect. ERISA is explicit that no person's benefit can be reduced as part of a merger or transfer of assets and liabilities between a single-employer plan and a multiemployer plan. 29 U.S.C. § 1412(b). Nor would the Crown plan of benefits be increased as a result of the merger. All Crown benefits were fixed (and fully earned) based upon the employees' past work for Crown, and there was no possibility of work for Crown in the future. If any participant in the Crown plan earned future benefits under PIUMPF, it would be solely for service with another employer making contributions to PIUMPF, and not due to that participant's status as a former Crown participant. Whether the assets were transferred to PIUMPF or used to

purchase an annuity, Crown was no longer in existence and was no longer the plan sponsor, and the composition, design and structure of the Crown plan benefits would not change.

In this respect, a plan merger in conjunction with termination is fundamentally different from a proposal to merge ongoing plans. If employees would continue to accrue benefits under a merged plan, that merger could affect the plan's structure. For example, if Crown were still operating its plants when PIUMPF proposed merger, and if the proposal contemplated that Crown would become a contributing employer to PIUMPF, employees would begin to accrue benefits under PIUMPF's benefit rules for their future Crown service, and Crown would be subject to PIUMPF's rules regarding contributions, reporting, and the other responsibilities of an employer with an ongoing agreement to be one of the employers maintaining that plan.

This same fact also distinguishes each of the cases that Petitioner and the government cite for the proposition that a plan merger or transfer of assets and liabilities is a change in plan structure that falls within the realm of plan sponsor prerogatives. Petitioner and the government cite *Malia v. General Elec. Co.*, 23 F.3d 828 (3d Cir. 1994), and *Sutter v. BASF Corp.*, 964 F.2d 556 (6th Cir. 1992). Both cases involved ongoing plans in which the plan sponsor continued to have obligations to the plan and the participants continued to accrue benefits under the new plan after the merger. (It should also be noted that *Sutter* has absolutely nothing to do with ERISA fiduciary duties, as the plan merger in question occurred in 1961, long before ERISA was enacted. 964 F.2d at 562.) The government also cites *Flanigan v. General Electric Co.*, 242 F.3d 78 (2d Cir. 2001); *King v. National Human Res. Comm., Inc.*, 218 F.3d 719 (7th Cir. 2000); and *Systems Council EM-3 v. AT&T Corp.*, 159 F.3d 1376 (D.C. Cir. 1998). All of those cases similarly involved transfers of assets and liabilities and spin-offs affecting ongoing plans and

participants who continued earning benefits under the new plans. Unlike the proposed PIUMPF transaction, all of those plan changes could affect the structure of the plans, as this Court has used that term.

Moreover, the Court of Appeals decision in this case does not offend any of Petitioner's policy arguments that a sponsor must be free to control decisions about plan merger for the purpose of furthering its business interests. As we already discussed, if a plan sponsor wants to reserve to itself, acting as a settlor, the decision whether to merge plans in connection with a termination, it can adopt a plan provision that withholds from the plan administrator any authority to merge the plan with another. The settlor thus will retain full control over any merger proposal in its capacity as plan sponsor. On the other hand, if the plan allows the plan administrator to exercise that authority as a means of implementing termination, then a decision on a proposal for merger must be made in accordance with ERISA's fiduciary standards.

As a final point in this regard, Petitioner argues that the Court of Appeals adopted a "temporal test" under which the fiduciary character of the decision concerning plan merger depended entirely on whether it was made before or after the plan sponsor's decision to terminate the plan. Pet'r Br. at 18-19. But the Court of Appeals' decision does not depend on the timing of the decision on merger, rather on its context. The decision whether to merge the Crown plan assets and liabilities into PIUMPF was fiduciary because it was made by the plan administrator to implement termination of the plan by deciding how to make final disposition of plan assets. That is a fiduciary decision under ERISA, if within the authority of the plan administrator, whether it is made before the employer formally resolves to terminate the plan or after.

For these reasons, the Court of Appeals correctly held that the decision whether to implement termination of the Crown plan by using the plan's assets to purchase an annuity or by

merging the plan into PIUMPF was a fiduciary decision under ERISA and had to be made in the interests of plan participants and beneficiaries. Petitioner does not challenge the bankruptcy court's factual finding that the Crown Board failed to give serious consideration to the PIUMPF proposal. Nor does Petitioner argue that it somehow complied with ERISA fiduciary duties in spite of that failure. The only remaining argument that Petitioner has is that the law would not have permitted merger into PIUMPF as a means of implementing the termination of the Crown plan. We turn now to that argument.

III. MERGER INTO PIUMPF WOULD HAVE BEEN CONSISTENT WITH THE STATUTE AND APPLICABLE REGULATIONS.

A. 29 U.S.C. § 1341(b)(3)(A) allows for merger into another plan as a method of distributing a terminating plan's assets and providing for its benefit liabilities.

The Court of Appeals correctly held that under 29 U.S.C. § 1341(b)(3)(A), which governs standard termination of single-employer plans, merger of a terminating plan into a multiemployer plan is a legally proper method of distributing the assets of, and providing the benefit liabilities of, the terminating plan.

Section 1341(b)(3)(A) states:

> (3) **Methods of final distribution of assets.**
>
> (A) In general. In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

> (i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, *or*
>
> (ii) *in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan.* A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

29 U.S.C. § 1341(b)(3)(A) (emphasis supplied).

The explicit terms of § 1341 permit the plan administrator to distribute the plan assets either through the purchase of an irrevocable commitment from an insurer (*i.e.*, an annuity contract) or by some other method that will "otherwise fully provide all benefit liabilities under the plan." If the plan administrator chooses a method other than an annuity, that method must be "in accordance with the provisions of the plan and any applicable regulations."

Two points are plain from the text. The first point is that Congress intended the purchase of an annuity contract to be one of a number of legally proper methods of "fully provid[ing] all benefit liabilities" to plan participants. There is no other way to understand the use of the word "otherwise" to link the annuity option in subsection (i) to the "fully provide all benefit liabilities" option in subsection (ii). The second point is that, at the least, subsection (ii) authorizes methods of distributing the plan assets that are the legal equivalent of purchasing an annuity contract in "fully provid[ing] all benefit liabilities under the plan."

Because Congress plainly intended the purchase of annuity contracts to be a method to "fully provide all benefit liabilities," and because Congress expressly permitted methods that "otherwise" accomplish that objective, it follows that if a particular type of transaction accomplishes the objective in a manner legally equivalent to an annuity contract, then

that type of transaction must be among those that satisfy § 1341(b)(3)(A)(ii)'s "otherwise fully provide all benefit liabilities" criterion. *See Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler,* 537 U.S. 371, 372, 385 (2003) (invoking the canon that words are known by their companions (the doctrine of *noscitur a sociis*) to hold that the term "'other legal process' should be understood to be process much like the processes [specified in the statute] of execution, levy, attachment, and garnishment.")

A third point critical to the proper interpretation of § 1341(b)(3)(A) insofar as it applies to this case is clear from the nature of purchasing an annuity contract and the nature of merging a terminating pension plan into another pension plan. That point is that the annuity purchase and the merger *are* legally equivalent methods of distributing the terminating plan's assets so as to "fully provide all benefit liabilities."

Insurers providing annuity contracts for the benefit of former ERISA plan participants only make unsecured *promises* to the participants. Those promises can be financed from the insurer's general assets. *See* 29 C.F.R. § 2510.3-3(d)(2). Insurers are not required to—and do not in practice—segregate the premium payment they receive from a terminating ERISA plan and place that payment in a separate trust for the participants, nor do they provide the participants with a specific piece of property or a claim to a divisible share of insurance company assets. *See generally* 56 Fed. Reg. 28638 (June 21, 1991) (Notice of Proposed Rulemaking by Department of Labor on "Annuitization of Participants and Beneficiaries Covered under Employee Pension Plans") ("DOL Annuitization Proceedings"). Rather, the insurer provides the annuitant with a certificate evidencing his or her contract rights *vis a vis* the insurer. The only legal right that an annuitant under such a contract possesses is the right to sue the insurer under state law for a breach of contract in the event of a default.

For that reason, as the Department of Labor and PBGC have recognized, participants who receive annuity rights due to plan termination are subject to the risk that the insurer will—due to poor investment choices by its financial managers, unexpected claims volume generated by its other insureds, or other contingencies—default on its promises and that the participants will not ultimately receive all the benefits they had been promised under the terminated plan. *See* DOL Annuitization Proceedings, 56 Fed. Reg. 28638, 28640 (citing then-recent insurance company failures; stating that "concerns have been expressed about the ability of certain insurance carriers to satisfy their annuity liabilities because their investment portfolios contain . . . 'junk bonds' . . . or troubled real-estate loans, or a combination of both"; and noting that state-law insurance guaranty programs vary widely and that most do not protect annuity interests over a certain amount, "usually $100,000"); General Accounting Office Report No. 93-29, Private Pensions: Protections for Retirees' Insurance Annuities Can Be Strengthened 17 (Mar. 1993) (detailing limitations of state guaranty programs and concluding that "the percentage of retirees whose benefits would not be fully covered by state guaranties are likely to rise over time"); 29 C.F.R. § 4041.27(b) (requiring notice about state guaranty programs be given to participants in a terminating plan whose benefits will be provided under an annuity contract).

Furthermore, PBGC opinion letters provide that when the administrator of a terminating plan purchases from an insurer an annuity contract that, on its face, promises to pay the benefits of the terminating plan, the terminating plan's benefit liabilities to participants under the plan are considered fully satisfied upon consummation of that purchase, and the terminating plan does not retain any residual or secondary liability to the former plan participants. PBGC Op. Letter 91-4 (May 3, 1991); PBGC Op. Letter 91-1 (Jan. 14, 1991). *See also* 29 C.F.R. § 4001.2 (distribution date when an annuity is purchased is the date on which the obligation to provide

benefits passes to the insurer). The PBGC thus treats a termination annuity purchase as the equivalent of a common-law contract novation, where a new obligor substitutes for the original obligor and the original obligor's liabilities are fully satisfied. *See* 30 Williston on Contracts § 76:1 (4th ed.) (the effect of a novation is that a "third party will be substituted for the obligor, as a result of which the obligor is released from liability and the third party takes its place"). The courts have embraced the PBGC's view on that issue. *E.g.*, *Waller*, 32 F.3d at 1345.

The merger proposed by PIUMPF, in which the transferee plan would assume the terminating plan's benefit obligations in exchange for a transfer of sufficient assets to finance those liabilities, has the same characteristics as an annuity purchase. It would provide for the same benefit promises made by the terminating plan by substituting a different promisor (the insurer in one case, the plan in the other). It would give the former participant the right to enforce that promise through a lawsuit (for breach of the annuity contract in one case, and for benefits due under the transferee plan in the other, *see Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134 (1985) (characterizing a claim for benefits due under a benefit plan as an ERISA "contract" claim)). In both transactions the former participant receives a written document embodying the new benefit promise (an annuity certificate in one case, *see* 29 C.F.R. § 2510.3-3(d); and a description of the plan rules in the other, *see* 29 U.S.C. § 1022)).

There is, in short, nothing about a plan merger that makes it any less (or more) a vehicle for "fully providing all benefit liabilities" than a termination annuity contract. A plan merger is, moreover, a better method, compared to an annuity contract, to accomplish one of the fundamental purposes of Title IV of ERISA, as declared by Congress: "to encourage the continuation and maintenance of voluntary private pension plans for the benefit of their participants," 29 U.S.C.

§ 1302 (a)(1).[8] This is not to deny that in certain cases, as the government suggests, the assumption of liabilities by another plan would entail a greater risk, compared to an annuity contract, that participants will not actually receive their benefits. Gov't Br. at 28-29. But, as the Executive Life experience demonstrates, the opposite may also be true. And, of course, in any particular case, the plan administrator's fiduciary duty to choose the safest method for providing future benefits, after appropriate investigation, would require the administrator to reject the riskier alternative. *See* 29 C.F.R. § 2509.95-1(c).

B. The legislative history of § 1341(b)(3)(A)(ii) confirms that Congress intended to permit flexibility in distributing assets upon plan termination, as long as the distribution fully provides all benefits.

Section 1341(b)(3)(A)(ii) originated in the Single Employer Pension Plan Amendments Act of 1986 (Title XI of the Consolidated Omnibus Budget Reconciliation Act of 1985), Pub. L. No. 99-272, 100 Stat. 82 (1986) ("SEPPAA"). SEPPAA had two main purposes: to increase the premiums that defined benefit plans pay to PBGC, and to impose structural reforms on the termination process to "close loopholes in existing law that permit profitable companies to avoid responsibility for the payment of certain benefits that are not guaranteed by the PBGC." *See* H. Rep. No. 99-300, at 279 (1985), *reprinted in* 1985 U.S.C.C.A.N. 756, 930. Prior to SEPPAA, an employer terminating a plan "generally

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[8] One other potential advantage of providing benefits through another plan after termination is that every ERISA plan must have a procedure for participants to present claims that their benefits are less than the plan document provided. 29 U.S.C. § 1133. If an annuity contract is premised on a mistaken calculation of a participant's benefit, the participant may have no recourse against the insurer for benefits that the annuity contract does not include.

ha[d] no obligation to pay for any benefits beyond those guaranteed by the PBGC." *Id.* at 290, U.S.C.C.A.N. at 941. Congress recognized that as a result, participants sometimes "lost substantial portions of the pension benefits to which they were entitled under the terms of their pension plan upon the termination of the plan, because these benefits were not guaranteed by the PBGC." *Id.*

To understand Congress's intent in drafting the rules governing the permissible methods of final distribution of plan assets, it is important to understand the regulatory structure in place prior to SEPPAA. *Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (Congress is presumed to be aware of the regulatory background against which it legislates). The PBGC had consistently expressed a strong preference for provision of benefits in annuity form—meaning periodic payments over a stream of time—rather than any form of lump sum distribution. The original PBGC regulations provided that "when a plan is closed out . . ., any benefit that is payable as an annuity under the provisions of the plan must be provided in annuity form either through the purchase from an insurer of a contract to provide the annuity or by the PBGC . . . ." 29 C.F.R. § 2615.4 (1981), 46 Fed. Reg. 9532, 9539 (Jan. 28, 1981). The regulation provided exceptions to this annuity requirement only where the benefit was *de minimis* or the plan provided for an alternative form of distribution and the participant elected that alternative form in writing. *Id.* Indeed, in adopting the 1981 regulations, the PBGC rejected a suggestion that plan administrators should have the discretion to provide benefits in a lump sum form upon plan termination without the participant's consent. In the preamble, PBGC explained: "A pension is a retirement annuity. It would be inconsistent with the Act for the PBGC to grant a plan administrator the discretion to deprive a participant entitled to a retirement annuity of that annuity." 46 Fed. Reg. at 9534.

In the early 1980s, a problem arose with certain employers abusing the termination process as a way to bleed surplus assets out of an on-going plan. *See generally* Veal & Mackiewicz, *supra,* at 165-68. Under long-standing tax law, an employer could not take a reversion from an on-going plan, as such would be an impermissible diversion of assets for a purpose other than the exclusive benefit of the plan beneficiaries. 26 U.S.C. § 401(a)(2). However, ERISA (as well as pre-existing tax and trust law) allowed employers to take a reversion of assets upon termination, if all benefit liabilities had been satisfied. 29 U.S.C. § 1341(d)(1). To take advantage of this, some employers engaged in what was referred to as a "spin-off/termination" transaction, in which they spun off plan liabilities, along with sufficient assets to cover those liabilities, into a new plan, leaving surplus assets in the original plan, then terminated the original plan in order to obtain the reversion.

In 1984, the Department of Labor, Internal Revenue Service and the PBGC issued Joint Implementation Guidelines to prevent these sham terminations. The Guidelines provided that in spin-off/terminations, "no termination will be recognized and any attempt to recover surplus assets will be treated as a diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries" unless the participants' accrued benefits were fully vested and "[a]ll benefits accrued as of the date of termination in the ongoing plan [were] provided for by the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant." Joint Implementation Guidelines on Asset Reversions ¶ 4, PBGC News Release 84-23 (May 24, 1984). *See generally* Veal & Mackiewicz, *supra*, at 173-74.

Following the issuance of these Joint Guidelines, the PBGC formally responded to several questions regarding their application to proposed transactions. The PBGC's responses consistently indicated that merging or transferring plan assets

into another plan was a permissible alternative to the purchase of annuity contracts from an insurer, as long as the transaction did not constitute a sham termination effected solely to obtain the reversion. *See* PBGC Op. Letter 85-7 (Mar. 4, 1985) (Guidelines do not apply to spin-off/termination where employer does not seek to take reversion; therefore plan administrator was not required to purchase annuities); PBGC Op. Letter 85-11 (May 14, 1985) (employer not required to purchase annuities for hourly employees spun off into new plan, where employer intended to terminate original plan covering remaining salaried employees and take reversion); PBGC Op. Letter 85-25 (Oct. 11, 1985) (Guidelines do not apply to proposed transfer of all liabilities of single-employer plan to a multiemployer plan, followed by termination of single-employer plan and reversion of surplus assets to the employer).

As the 99th Congress turned its attention to ERISA reform, the initial Administration proposal introduced in the House of Representatives reflected the PBGC preference for benefits paid in annuity form, requiring that "the plan administrator shall distribute plan assets in accordance with section 1344 by—"

> (i) purchasing irrevocable commitments to provide when due all benefits described in subparagraph (A) to all participants and beneficiaries, or
>
> (ii) otherwise fully satisfying *the obligation to provide when due* all such benefits in accordance with the provisions of the plan and any applicable regulations of the corporation.

H.R. 2995, 99th Cong. § 105(b)(3)(E) (1st Sess. 1985) (emphasis supplied); *see* H. Rep. No. 99-300, at 286 (1985), *reprinted in* 1985 U.S.C.A.A.N. 756, 937 ("The Administration legislation was introduced . . . as H.R. 2995 on July 15, 1985"). The language proposed by the Administration for subsection (ii) required that any alternative distribution "pro-

vide when due" the benefits—*i.e.*, over the time periods when they would have been paid under the terminating plan—and not in the form of a lump-sum equivalent. The Administration clearly contemplated a form of distribution, other than purchase of annuity contracts from an insurer, that would provide a stream of benefits over time—much as another defined benefit plan would do.

Although Congress ultimately enacted the basic structure of the Administration's proposal for distribution of plan assets, significantly, Congress enacted a less restrictive rule for distribution by methods other than annuity contracts. The rule enacted by Congress allowed plan administrators to choose any alternative method of distribution permitted by the plan, as long as that method "fully provide[d]" the benefits due to beneficiaries and as long as regulations did not forbid that method.

Two points are compelled by this background. First, neither the Administration that proposed the bill that became § 1341(b)(3)(A) nor the Congress that enacted this section intended to limit the subsection (ii) option to lump sum distributions or other immediate disbursements to plan beneficiaries. Second, the fact that Congress phrased subsection (ii) broadly suggests that the subsection (ii) option includes all methods of distributing assets that are the legal equivalent of the purchase of an annuity contract in "fully provid[ing] all benefit liabilities under the plan"—including the kinds of distributions PBGC had previously allowed in the form of transferring assets and liabilities to another plan.

C. Neither the words singled out by Petitioner and the government in § 1341(b)(3) nor the structure of ERISA preclude the Court of Appeals' interpretation.

Between them, Petitioner and the government make essentially three arguments from statutory language for reading

§ 1341(b)(3) to preclude the merger of a terminating plan into a multiemployer plan, and one argument based on statutory structure to the same end. None of these arguments bears inspection.

1. Petitioner argues that the clause "or otherwise fully provide" can be interpreted only to authorize lump-sum cash payments (with transfer to PBGC, on behalf of a participant or beneficiary the plan cannot locate, serving in the place of a direct payment, as specified in § 1341(b)(3)(A)(ii)). Pet'r Br. at 21. That argument is not a reasonable interpretation of § 1341. It would have been a simple matter for Congress to specify in § 1341(b)(3) that the plan administrator shall either purchase an annuity or make lump-sum cash distributions to participants, if that is what it intended.[9] The use of the term "otherwise fully provide" connotes a broader range of alternatives than just lump-sum cash distributions. An interpretation of subsection (b)(3)(A)(ii) to allow only lump-sum distributions would, moreover, be inconsistent with the legislative history of that subsection, discussed *supra* at 27-31.

2. In a variation on the same theme, Petitioner and the government contend that transfer of assets to another plan cannot satisfy the plan administrator's duty under § 1341(b)(3)(A) to "distribute the assets." Relying on dictionary definitions of "distribute" and simple assertion, they contend first, that a distribution necessarily entails dividing assets among multiple recipients and delivering the appropriate share to each participant, and second, that transfer to another plan does not accomplish such an individual delivery because it permits the assets to be commingled with assets

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[9] Congress used the term "lump sum distribution" in other parts of ERISA. For example, in Title II of ERISA (the portion of ERISA that appears in the Internal Revenue Code) the term "lump sum distribution" in the context of a pension plan is defined. 26 U.S.C. § 402(e)(4). This provision was in the Code when Congress added "otherwise fully provide" to § 1341(b)(3)(A).

that can be used for other participants. Pet'r Br. at 22-24; Gov't Br. at 18-19.[10] Petitioner adds that because the administrator must certify under § 1341(b)(3)(B) that it has distributed the assets "so as to pay all benefit liabilities," there must be a contemporaneous disbursement of assets to individual participants. Pet'r Br. at 22-23. And, the government further suggests that this requirement is not satisfied if the participants must await the payment of benefits by the merged plan as those benefits come due. Gov't Br. at 20.

The statute precludes these arguments. Because an annuity contract is the one method of final distribution of a terminating plan's assets that is specifically authorized by § 1341(b)(3), the statute itself defines what Congress meant by the word "distribution" and the phrase "pay all benefit liabilities." If, as Congress plainly intended, a plan administrator who writes a check to an insurer to purchase an annuity contract accomplishes a "distribution" and "pay[s] all benefit liabilities," then the administrator who writes a check to a multiemployer plan in exchange for its assumption of all benefit liabilities equally satisfies those two requirements. In each case participants receive no immediate payment or dedicated share of plan assets, but a contract right to receive future payments as they come due.

It is also to the point that the way Congress used the word "distribute" in § 1341 echoes the usage of that term in the common law of trusts and estates. *See Varity Corp.*, 516 U.S. at 502 (in interpreting ERISA, it is appropriate to look to "the common law, which, over the years, has given to terms such

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[10] Both Petitioner and the government cite 26 C.F.R. § 1.414(*l*)-1(b)(1), (2) for the proposition that plan assets in a merged plan *cannot* be segregated for the provision of benefits to participants in the merging plan. Pet'r Br. at 24; Gov't Br. at 19. This reliance is mistaken, because the regulations they cite apply only to single-employer plans; they do not apply when a multiemployer plan is involved "except to the extent provided by regulations of [PBGC]." 26 C.F.R. § 1.414(*l*)-1(c)(2). There are no such regulations.

as 'fiduciary' and trust 'administration' a legal meaning to which, we normally presume, Congress meant to refer"). In the law of trusts and estates, the word "distribution" is used to describe the final transfer of assets out of a trust or estate, whether there is one beneficiary or many.[11] It is also frequently the case that such a distribution is made to another trust, and not directly to a beneficiary, contrary to the assertions of Petitioner and the government. Pet'r Br. at 21, Gov't Br. at 18-19. Such a transfer is common practice in distributing assets from an estate.[12]

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[11] *See, e.g.*, Uniform Trust Code §§ 816(26), 817(b) (using "distribute" to describe the authority and the duty of a trustee to make a final disposition of the trust property following termination); Uniform Probate Code § 3-703(a) ("A personal representative is under a duty to settle and *distribute* the estate of the decedent in accordance with the terms of any probated and effective will and this Code, and as expeditiously and efficiently as is consistent with the best interests of the estate.") *See also Leith v. Mercantile Trust Co. Nat'l Ass'n,* 423 S.W.2d 75, 78, 85 (Mo. Ct. App. 1967) (fiduciary's duties in winding up a trust with a sole beneficiary included "distribution" of the trust property; beneficiary is described as "the sole distributee of a trust estate"); *Estate of Somers,* 89 P.3d 898 (Kan. 2004) (trust provided that after death of life beneficiaries, all remaining assets would be "distributed" to a single remainder beneficiary); *American Cancer Soc'y v. Hammerstein,* 631 S.W.2d 858, 864-65 (Mo. Ct. App. 1981) (litigation over trustee's decision to terminate trust and "distribute" all of its assets to the sole life beneficiary).

[12] The Uniform Trust Code acknowledges that trustees have authority to distribute assets to another trust in appropriate circumstances, even if the trust instrument does not provide for such a distribution. Uniform Trust Code § 816(21)(B). Scott on Trusts recognizes that a provision for distribution to another trust may affect the form in which property is distributed. IV Scott on Trusts § 347.7, at 579-80 (4th ed. 1989). The Uniform Probate Code § 1-201(13) defines "distributee" to include both "a testamentary trustee" and "a beneficiary of a testamentary trust." *See also, e.g., In re Klosinski,* 746 N.Y.S.2d 350 (Sur. Ct. 2002) (pour-over trust was the sole beneficiary designated in the will; the transfer of the estate's assets to the trust is described as a distribution of the estate); *Pastan v. Pastan,* 390 N.E.2d 253 (Mass. 1979) (executor's transfer of estate assets to a marital share trust was a distribution).

3. Petitioner and the government argue that because § 1341(b)(3) requires a distribution "in accordance with § 1344," only an actual "allocat[ion]" of assets to participants following the priority categories listed in § 1344 will satisfy the distribution requirement. Pet'r Br. at 22-24; Gov't Br. at 19. That contention fails, because a standard termination cannot be carried out unless the terminating plan is fully funded, meaning that there are sufficient funds available in the terminating plan to satisfy all six categories of § 1344(a). *See* 29 U.S.C. § 1341(b)(1)(D). No "allocation" among the six categories therefore takes place in a standard termination. If the plan administrator purchases an annuity contract from an insurer, that annuity satisfies the conditions of § 1344(a) in precisely the same way that a termination carried out through a plan merger would. Because the insurer (or the plan) is promising to meet all benefit liabilities, including those represented in all six categories of § 1344(a), no allocation among the six categories is required.[13]

4. Finally, Petitioner and the government argue that the structure of ERISA evidences an intention to treat plan mergers

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[13] IRS regulations are consistent with this understanding of § 1344. In mergers of single-employer plans, Internal Revenue Code § 414(*l*) requires parity of benefits before and after the merger "on a termination basis," meaning that benefit liabilities must be allocated to the priority categories in § 1344. 26 C.F.R. § 1.414(*l*)-1(b)(5). (The parallel provision in Title I of ERISA is 29 U.S.C. § 1058.) Under those regulations, if the plans' total assets are sufficient to cover all benefit liabilities, § 1344 is "satisfied merely by combining the assets and preserving each participant's accrued benefits." 26 C.F.R. § 1.414(*l*)-1(e)(1). If any participant would receive a smaller benefit on a termination basis from the merged plan, § 1344 is satisfied simply by inserting a special schedule of benefits that would implement the § 1344 allocation in the event the merged plan terminates or merges with yet another plan within the following five years. 26 C.F.R. § 1.414(*l*)-1(e)(2), (f)-(j). Similar provisions are made for spin-offs of defined benefit plans. *Id.* (n). Under these regulations, no actual distribution or dedication of assets is required to comply with § 1344.

and terminations as separate and distinct processes. Pet'r Br. at 28-35; Gov't Br. at 23-25. The differences between the two processes, however, do not mean that a merger cannot be a means of implementing a plan termination. Many plan mergers take place without intent to terminate a plan; in those cases, the requirements for plan merger can be followed without consulting the requirements for plan termination. Conversely, many plan terminations take place without an associated merger; in those cases there is no need to consult the requirements for mergers. But if a plan sponsor intends to use merger as a method of implementing a plan termination, it simply must follow the rules for both merger and termination.

Those rules are not "mutually exclusive," as Petitioner asserts. Pet'r Br. at 33. As noted above, page __, the principal requirement for all mergers (single-employer, multiemployer, or a combination of the two) is that accrued plan benefits be preserved in the transaction. The rule that applies when two single-employer plans merge requires that the value of those benefits be calculated "on a termination basis," but that means only, as we have seen, pages __, that they be calculated in both plans by reference to the § 1344 priorities.[14]

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[14] Petitioner argues that requiring calculation of benefit values in a single-employer plan merger "as if the plan then terminated" would be meaningless if merger could be used as a means of termination. Pet'r Br. at 32. There are two simple answers to this argument. First, this provision would continue to be necessary in those single-employer plan mergers that are accomplished with no intent to terminate a plan. Second, this "as if" provision is simply a shorthand method of referring to a common basis of calculating the extent of funding for benefit liabilities in both plans, as specified in 29 U.S.C. § 1344.

The Petitioner also relies on the § 4041.23(b)(9) notice provision, arguing that this provision is "mutually exclusive" with 29 C.F.R. § 2525.104-4, which the Petitioner describes as requiring "notice after the merger." Pet'r. Br. at 33. While there is no regulation at 29 C.F.R. § 2525.104-4, one may presume the Petitioner is referring to 29 C.F.R. § 2520.104-4. Section 2520.104-4 is part of the Department of Labor's general rules governing provision of summary plan descriptions, and simply sets forth

PBGC approval is not needed to effect an ordinary merger, but if a merger is being used to terminate a plan and results in a reversion of assets to an employer, the plan administrator will be required to comply with the requirements for termination. Moreover, the statute gives PBGC authority to prescribe by regulation "such additional requirements with respect to the transfer of assets or liabilities [between single-employer and multiemployer plans] as may be necessary to protect the interests of plan participants and beneficiaries and the corporation." 29 U.S.C. § 1412(f). If PBGC concludes that additional restrictions on such mergers are required to avoid an end-run around the termination requirements, or to avoid adverse consequences for the PBGC guaranty program, it has the regulatory authority to adopt them.[15]

"an alternative method of compliance" with these general rules for "certain successor pension plans in which some participants and beneficiaries not only have their rights set out in the plan, but also retain eligibility for certain benefits under the terms of a former plan which has been merged into the successor" where "plan mergers . . . occur after the issuance by the successor plan of the initial summary plan description under the Act." That provision is entirely compatible with provisions for prior notice of a plan termination. The plan administrator of the terminating plan would send the termination notice before termination, and the plan administrator of the new plan would send a summary plan description detailing benefits after the merger is complete.

[15] Petitioner makes a separate argument that § 1341 requires a method of distribution that takes the plan's assets and liabilities "outside of the ERISA-regulated pension plan system." Pet'r Br. at 25 n.9, 27. This argument finds no support in the statute or regulations, and is based on nothing more than the fact that the two distribution methods Petitioner acknowledges—annuity purchase and lump-sum payments—have this result. Nowhere does the statute specify that this is a necessary criterion for a method to "otherwise fully provide all benefit liabilities under the plan." And creating such a requirement out of whole cloth would run contrary both to the regulatory actions preceding SEPPAA that Congress is presumed to have had in mind when it chose the critical statutory phrase, and the purpose of Title IV to encourage the continuation of defined benefit plans. *See* 26-31, *supra*.

For all of these reasons, the proposed merger of the Crown plan into PIUMPF would have satisfied the requirements that it effect a distribution of plan assets and fully provide all benefit liabilities under the plan within the meaning of § 1341(b)(3). As a means other than purchase of annuities, it was also required to be in accordance with the terms of the plan and in accordance with "any applicable regulations." As we discussed above, the district court found that the merger would have been in accordance with the terms of the plan and that ruling is not challenged here. Page 16 *supra*. We now turn to the applicable regulations and show that the proposed merger would have been fully in accordance with those regulations.

D. The proposed merger with PIUMPF would have been in accordance with applicable regulations.

Section 1341(b)(3)(A)(ii), as we have seen, provides that in implementing a standard termination, a plan administrator may use a method other than an annuity contract for "distributing [plan] assets" but, if so, the administrator shall "in accordance with the provisions of the plan and *any applicable regulations* otherwise fully provide all benefit liabilities under the plan." (Emphasis supplied.)

While the government asserts in its brief that the PBGC regulations do not permit a plan merger as a method of implementing plan termination, that assertion is not consistent with the applicable regulations or with PBGC's regulatory actions outside of litigation. We discuss the applicable regulations and PBGC's regulatory actions in this section. In Section E we demonstrate that the Court's standards for giving weight to an agency's interpretation of its own regulations are not satisfied, and that the litigating position announced in the government brief to this Court is not entitled to deference.

1. The sole applicable regulation states as follows:

> Method of distribution—(1) In general. The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer *or in another permitted form.*

29 C.F.R. § 4041.28(c)(1) (2006) (emphasis supplied). The beginning, middle, and end of this language is that there are permitted forms for distributing plan assets in addition to the "purchase of an irrevocable commitment" from an insurer. Nothing in the regulation can possibly be read as providing that only a lump sum cash distribution or rollover into an individual retirement account is a permitted form. And everything we have said about the underlying statute supports the conclusion that a distribution method that is the legal equivalent of purchasing an annuity contract in fully providing all benefit liabilities under the plan also comes within the term "another permitted form [of distribution]."

2. On the one occasion on which the PBGC considered the issue raised in this case, the PBGC concluded that transferring assets and liabilities to a multiemployer plan is a permissible method of distributing assets upon plan termination, without purchasing annuities. In 1985, a company requested the PBGC's opinion regarding whether the Joint Implementation Guidelines on Asset Reversions applied to a proposed transaction in which an employer would transfer a single-employer plan's assets and liabilities to a multiemployer plan, and, in so doing, terminate the single-employer plan and take a reversion of surplus assets from it. PBGC Op. Letter 85-25 (Oct. 11, 1985). These Joint Implementation Guidelines, discussed *supra* at 29, provided that when plan assets were being spun off into a new plan as part of a termination, "no termination will be recognized and any attempt to recover surplus assets will be treated as a

diversion of assets for a purpose other than the exclusive benefit of employees and beneficiaries" unless the participants' accrued benefits are fully vested and *"[a]ll benefits accrued as of the date of termination in the ongoing plan [are] provided for by the purchase of annuity contracts* which represent irrevocable commitments for the benefit of each individual participant." Joint Implementation Guidelines on Asset Reversions, PBGC News Release 84-23 (emphasis supplied).

In responding to this company's inquiry regarding the Joint Implementation Guidelines, the facts set forth by the PBGC closely parallel the proposed Crown-PIUMPF transaction:

> [A] company that currently maintains a single-employer plan covering its union employees . . . has proposed a termination of its single-employer plan, with a resultant reversion of excess assets to the company (as permitted by the plan document). The union that represents the company's employees is willing to agree to the termination subject to certain conditions, one of which is that the company become a participant in, and transfer assets and liabilities to, a multiemployer pension plan to which the union is already a party. The multiemployer plan in question is fully funded.

PBGC Op. Letter 85-25 (Oct. 11, 1985). The PBGC concluded that "a transfer from a single-employer plan to an ongoing multiemployer plan followed by the termination of the single-employer plan, is not generally a transaction to which the spin-off/termination requirements of the guidelines [*i.e.*, "the purchase of annuity contracts which represent irrevocable commitments for the benefit of each individual participant"] apply." *Id.*[16]

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[16] The PBGC went on to say that "if the transaction lacks a substantial business purpose and instead is intended as a means to recover surplus plan assets without satisfying the plan termination requirements of Title IV of ERISA, the PBGC will not recognize the termination." *Id.* This

The government now attempts to explain away this 1985 Opinion letter—without disavowing it—by stating that the letter did not "suggest that the termination could be accomplished without following the ordinary procedure of purchasing annuities or otherwise distributing the assets of the terminating plan to the participants and beneficiaries." Gov't Br. at 26. That, however, is the only logical reading of the Opinion Letter. In asking if the Guidelines applied, the company was asking if it need adhere to the Guidelines' requirement that benefits "must be provided for by the purchase of annuity contracts which represent irrevocable commitments," or whether, instead, it could "transfer assets and liabilities to[] a multiemployer pension plan." By responding that the Guidelines did not apply, the PBGC expressed the opinion that such a transaction would be a valid plan termination and that *purchase of an annuity contract was not required.* This is precisely as the letter is described in a treatise co-written by the author of that opinion letter. Veal & Mackiewicz, *supra*, at 172-73 ("A transfer of assets and liabilities from a single-employer plan to a multiemployer pension plan is not a spinoff for purposes of the guidelines. The plan sponsor may terminate the remaining portion of the plan and receive a reversion without regard to whether the multiemployer plan annuitizes any benefits.")

The government also attempts to avoid the import of the 1985 Opinion Letter by pointing out that it predates the creation of the statutory language here. Gov't Br. at 25. However, that litigating statement contradicts PBGC's regulatory pronouncements. After enactment of the 1986 and

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merely restates the PBGC's ongoing rule that sham terminations implemented without a substantial business justification and only to obtain a reversion would not be recognized. There was no suggestion that the termination at issue, in which the employer was motivated by a desire to comply with the union's request for the multiemployer plan to take over the benefit liabilities, lacked a substantial business justification.

1987 amendments, PBGC reaffirmed the Guidelines and has never disavowed the opinion letters it issued to interpret them. *See, e.g.*, 57 Fed. Reg. 59206, 59212 (Dec. 14, 1992) ("In order to have a valid termination in a spin-off/ termination transaction involving asset reversions to the contributing sponsor, plan administrators must comply with the Implementation Guidelines . . . ."); 53 Fed. Reg. 1904, 1905 (Jan. 22, 1988) ("It should be noted that the [Pension Protection Act of 1987] does not change the Joint Implementation Guidelines issued . . . on May 24, 1984.") *See also* Veal & Mackiewicz, *supra*, at 168-74.

3. Indeed, to the extent that the PBGC has changed its regulations regarding distribution of assets since the enactment of SEPPAA, it has moved towards granting plan administrators greater flexibility, not less. Prior to 1997, the regulations contained a section entitled "Annuity requirements" requiring that:

> [W]hen a plan is closed out under Sec. 4041.27 (in a standard termination) . . ., any benefit that is payable as an annuity under the provisions of the plan must be provided in annuity form through the purchase from an insurer of a single premium, nonparticipating, nonsurrenderable annuity contract that constitutes an irrevocable commitment by the insurer to provide the benefits purchased.

29 C.F.R. § 4041.6(a) (1996), 61 Fed. Reg. 34002, 34042 (July 1, 1996).[17] Subsection (b) of that section stated that the only exceptions (other than a provision for participating annuities in subsection (d)) would be an alternative form of distribution *if* permitted under the plan *and if* either the actuarial present value of the benefit was less than $3,500 or the participant elected the alternative distribution form in

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[17] These regulations were, in pertinent part, substantively unchanged between 1981 and 1997. *Compare* language cited in text *with* 29 C.F.R. §§ 2615.4, 2615.21 (1981), 46 Fed. Reg. 9532 (Jan. 28, 1981).

writing. *Id.* at 34042-43. Similarly, the pre-1997 regulations provided:

> Method of distribution. The plan administrator shall distribute plan assets in accordance with Sec. 4041.6 by purchasing irrevocable commitments from an insurer in satisfaction of all benefit liabilities that must be provided in annuity form, and by otherwise providing all benefit liabilities that need not be provided in annuity form.

29 C.F.R. § 4041.27(c) (1996), 61 Fed. Reg. at 34048. Read together, the two paragraphs required distribution of all benefits "payable as an annuity under the provisions of the plan" in the form of an annuity contract, and gave the plan administrator latitude to "otherwise provid[e]" distributions only in very limited circumstances.

In 1997, the PBGC substantially revised the pertinent regulations, in a manner that permitted additional methods of providing for benefit liabilities. "[R]evising and simplifying the standard termination process," the PBGC eliminated the "Annuity requirement" provision formerly contained in § 4041.6(a), and affirmatively broadened the "Method of distribution" language (formerly § 4041.27(c)) to the language currently contained in § 4041.28(c)(1), authorizing plan administrators to "distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form." Nowhere in the regulation did PBGC attempt to catalog those other "permitted form[s]" or specify any criteria that would have to be met for an alternative to be a "permitted form." The regulation thus gave plan administrators more latitude to distribute plan assets by means other than an annuity. 62 Fed. Reg. 60424, 60434 (Nov. 7, 1997). The broader rule adopted by the PBGC necessarily permits that which was permitted under the predecessor, narrow rule—namely, the method of distribution addressed in Opinion Letter 85-25 and proposed by PIUMPF here.

4. Lacking any regulation that limits a plan administrator's choice of methods to "otherwise fully provide all benefit liabilities," Petitioner argues that the broad wording of § 4041.28(c)(1) actually operates as a limitation, prohibiting distribution forms other than purchase of annuities or lump-sum payments. *See* Pet'r Br. at 23-24. That argument is contradicted by the government, which concedes that § 4041.28(c)(1) "could conceivably encompass a distribution method other than a lump sum payment or rollover." Gov't Br. at 23.

The government in its turn, however, contends that the word "satisfaction" in § 4041.28(c)(1) requires both a distribution of assets among the various beneficiaries of the plan and contemporaneous receipt of benefits by those entitled to them. Gov't Br. at 21-22. This interpretation—advanced for the first time in the government's amicus brief—is untenable. As we explained in discussing the underlying statute, a transfer of plan assets to another plan and assumption of the terminating plan's liabilities by that plan "satisfies" the terminating plan's obligation to the beneficiaries in the same way that purchase of an annuity does, because it discharges the first plan's obligation to the plan beneficiaries, similar to a novation under the common law of contracts.

The government points to only one additional regulation, 29 C.F.R. § 4041.23(b)(9), as arguably inconsistent with merger of a terminating plan into a multiemployer plan as a means of implementing a standard termination. Gov't Br. at 22. This regulation requires that participants in a terminating plan be provided a notice stating that "after plan assets have been distributed in full satisfaction of all plan benefits under the plan with respect to a participant or a beneficiary of a deceased participant, either by the purchase of irrevocable commitments (annuity contracts) or by an alternative form of distribution provided for under the plan, the PBGC no longer guarantees that participant's or beneficiary's plan benefits."

29 C.F.R. § 4041.23(b)(9). This notice regulation cannot bear the weight the government would put on it.

The mere fact that the PBGC has provided a notice requirement designed for what are by far the most common distribution methods—purchase of an annuity contract or issuance of lump-sum payments—cannot be read as an outright prohibition on any other type of distribution. To read a simple notice requirement to impose such a substantive limitation on a statutory provision is asking too much, particularly where the portions of the regulation that specifically address the distribution of assets upon termination are broader. And, in any event, it is entirely possible for a plan administrator to comply with § 4041.23 when implementing a termination through merger. In such a termination, it would be true that the PBGC no longer guarantees the benefits under the original plan—indeed, the PBGC guarantee of benefits under a multiemployer plan would be substantively different.[18] It would be appropriate to issue notice to participants and beneficiaries informing them that the original PBGC guarantee has been extinguished and telling them of the new guarantee terms.

The foregoing represents the totality of the government's and Petitioner's arguments that merger as a means of distributing plan assets in a termination is inconsistent with the applicable regulations. But *amicus* Chamber of Commerce offers some additional arguments, mainly in an attempt to rewrite the history of PBGC's position on alternate forms of distribution. The Chamber does, in addition, cite one regulation—the PBGC's definition of "distribution date," contained in 29 C.F.R. § 4001.2—which it claims is inconsistent with merger as a means of distribution of assets. However, far from being inconsistent with merger as a method of dis-

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[18] *Compare* 29 C.F.R. § 2520.102-3(m)(3) (description of PBGC guarantee that the Department of Labor prescribes for inclusion in single-employer summary plan descriptions) *with id.* § 2520.102-3(m)(4) (same for multiemployer plans).

tribution, this regulation recognizes that assets may be distributed to another plan:

> For benefits provided other than through the purchase of irrevocable commitments, the date on which the benefits are delivered to the participant or beneficiary (*or to another plan or benefit arrangement* or other recipient authorized by the participant or beneficiary in accordance with applicable law and regulations) . . . .

29 C.F.R. § 4001.2(1)(ii) (emphasis supplied).

As to the PBGC practices over the years, the Chamber cites two current documents, neither of which purports to replace the PBGC regulations and both of which refer readers to the statute and regulations themselves for the authoritative statement of termination requirements[19]: 1) a PBGC "Small Business Guide" issued in October 1998, and 2) the PBGC Standard Termination Filing Instructions. *See* Chamber Br. at 11-12. The rest of the materials the Chamber cites were issued by the PBGC prior to the 1997 change in the regulations: 1) a 1988 advisory notice issued to alert the public to changes in ERISA made by the Pension Protection Act of 1987, 53 Fed. Reg. 1904, 1905 (Jan. 22, 1988), Chamber Br. at 5, 9, and 2) the preamble to PBGC regulations issued in 1981, 46 Fed. Reg. 9532, 9534 (Jan. 28, 1981), Chamber Br. at 13-14. Although the Chamber does not so much as acknowledge that PBGC revised its regulations in 1997, the change in that year was substantive, as discussed at 42-43, *supra*. The pre-1997 documents that the Chamber cites

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[19] *See* PBGC, Small Business Guide 1, Pub. 1008 (Oct. 1998), *available at* http://www.pbgc.gov/docs/small%20business%20guide.pdf ("This Guide is an aid, but it does not replace the statutes and regulations that contain the legal requirements for pension plans."); PBGC, Standard Termination Filing Instructions 2, *available at* http://www.pbgc.gov/docs/500_instructions.pdf (last visited April 3, 2007) ("The specific rules for terminating a single-employer plan in a standard termination are set forth in sections 4041(a), 4041(b) and 4050 of [ERISA] . . . and in the PBGC's regulations . . . .")

merely express the PBGC's interpretation of its *prior* regulation and do nothing to advance the Petitioner's case.[20]

E. The Court should not defer to the interpretation of PBGC regulations that was advanced in the government's brief.

Although, for the sake of clarity, we have saved our rebuttal for last, we recognize that the government argues that PBGC's interpretation of its regulations—as asserted in its brief in this Court—is entitled to deference under this Court's ruling in *Auer v. Robbins*, 519 U.S. 452, 461 (1997). Gov't Br. at 21. Stated simply, the government's call for *Auer* deference here is entirely misplaced.

As a general matter, this Court has declined to defer "to agency litigating positions that are wholly unsupported by regulations, rulings, or administrative practice," because "'Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands.'" *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212-13 (1988) (quoting *Investment Co. Institute v. Camp*, 401 U.S. 617, 628 (1971)). This principle has particular force where the agency's litigating position is contrary to a view the agency has expressed in the past. *Id.*

And in *Gonzales v. Oregon*, 126 S. Ct. at 914, the Court—while reiterating *Auer*'s point that "[a]n administrative rule may receive substantial deference if it interprets the issuing

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[20] Moreover, the purpose of the 1988 advisory notice was to alert the public to statutory amendments in the Pension Protection Act of 1987, changes that had nothing to do with the language at issue in this case. The primary change effected by the PPA was "the increase in plan benefits that must be paid in order for a plan to terminate in a standard termination," 53 Fed. Reg. at 1905, specifically through expanding the requirement to pay "benefit commitments" to the broader "benefit liabilities." Pub. L. No. 100-203, § 9313(a)(2)(C)(i), 101 Stat. 1330 (1987). It is clear from the text of the advisory notice that the PBGC's focus was on advising employers of their liability for larger amounts of plan benefits.

agency's own ambiguous regulation," *id.*—added that *Auer* deference *does not apply* when the "underlying regulation does little more than restate the terms of the statute":

> In *Auer*, the underlying regulations gave specificity to a statutory scheme the Secretary was charged with enforcing and reflected the considerable experience and expertise the Department of Labor had acquired over time with respect to the complexities of the Fair Labor Standards Act. Here, on the other hand, the underlying regulation does little more than restate the terms of the statute itself. The language the Interpretive Rule addresses comes from Congress, not the Attorney General, and the near-equivalence of the statute and regulation belies the Government's argument for *Auer* deference.

Id. at 915. In such a case, the agency's interpretations are entitled to only *Skidmore* deference, *id.* at 922, meaning they are "'entitled to respect' . . . but only to the extent that those interpretations have the 'power to persuade.'" *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (quoting *Skidmore*, 323 U.S. at 140).[21]

Here, as was the case in *Gonzales v. Oregon*, the PBGC regulation does little more than restate the statute itself.

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[21] *Auer v. Robbins* specifically involved the Secretary of Labor's interpretation, advanced in an *amicus* brief, of the Department of Labor's regulation setting forth the "salary basis" test for certain exemptions under the Fair Labor Standards Act. The *amicus* brief provided the Secretary's view of how the salary basis test, a complex requirement developed entirely as a matter of agency regulation, applied to a specific factual situation— namely, whether the requirement that an employee's salary not be "subject to reduction because of variations in the quality or quantity of the work performed" is violated "when employees are covered by a policy that permits disciplinary or other deductions in pay 'as a practical matter'" but where that policy is not necessarily applied. *Id.* at 461-62. The Court's decision to defer to the Secretary's interpretation relied heavily on the fact that "the salary-basis test is a creature of the Secretary's own regulations." 519 U.S. at 461.

Compare 29 U.S.C. § 1341(b)(3)(A) ("In distributing [plan] assets, the plan administrator shall—(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or (ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan") *with* 29 C.F.R. § 4041.28(c)(1) ("The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.") The substitution of the unelaborated words "or in another permitted form" for the statutory term "otherwise fully provide" gives no specificity to the statutory scheme, and reflects no considered judgment or expertise of the PBGC. *See Gonzales*, 126 S. Ct. at 915.

Despite having no regulation that provides a gloss on § 1341(b)(3)(A)(ii) and its authorization of methods to distribute assets that "otherwise fully provide" for a terminating plan's benefit liabilities, and having no regulations at all governing mergers of single-employer plans into multiemployer plans, the PBGC now seeks to advance through an *amicus* brief a substantive interpretation of § 1341(b)(3)(A)(ii) that is squarely at odds with that provision's plain meaning. The PBGC does so despite the fact that a decade ago, it affirmatively changed its own regulation in a manner that is inconsistent with its litigation argument. *Cf. Caruso v. Blockbuster-Sony Music Entm't Centre*, 193 F.3d 730, 736-37 (3d Cir. 1999) (declining to defer to agency position articulated in Technical Assistance Manual, where notice and comment rulemaking intentionally left question unresolved). And the PBGC does so without explaining why, on the one previous occasion when it was confronted with this same question, it came to the opposite conclusion. These are precisely the sort of circumstances which have led this Court

to treat an agency's litigating position with "near indifference." *Mead Corp.*, 533 U.S. at 227-28.[22]

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the Court of Appeals in this case.

Respectfully submitted,

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[22] Moreover, it bears noting that the PBGC—unlike the Department of Labor in *Auer*—is not a disinterested party. While, in *Auer*, the Department of Labor was advancing its views regarding the regulation of conduct between third parties, the PBGC, as demonstrated in the government's brief, seems to be motivated by a desire to limit the breadth of coverage of its insurance program. *See* Gov't Br. at 29-30. This intent may well be at odds with Congress's intent, which was to foster the establishment and maintenance of defined benefit plans. *See* SEPPAA § 11002(c)(2) (1987) ("It is hereby declared to be the policy of this title . . . to encourage the maintenance and growth of single-employer defined benefit pension plans . . . ."); Multiemployer Pension Plan Amendments Act of 1980, Pub. L. No. 96-364, § 3(c)(3), 94 Stat. 1208 (1980) ("It is hereby declared to be the policy of this Act . . . to alleviate certain problems which tend to discourage the maintenance and growth of multiemployer pension plans.")

APPENDIX

APPENDIX

STATUTES AND REGULATIONS

29 U.S.C. § 1002

Sec. 1002. Definitions

For purposes of this subchapter:

* * * *

(21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

* * * *

29 U.S.C. § 1341

Sec. 1341. Termination of single-employer plans

* * * *

(b) Standard termination of single-employer plans

* * * *

(3) Methods of final distribution of assets

(A) In general

In connection with any final distribution of assets pursuant to the standard termination of the plan under this subsection, the plan administrator shall distribute the assets in accordance with section 1344 of this title. In distributing such assets, the plan administrator shall—

(i) purchase irrevocable commitments from an insurer to provide all benefit liabilities under the plan, or

(ii) in accordance with the provisions of the plan and any applicable regulations, otherwise fully provide all benefit liabilities under the plan. A transfer of assets to the corporation in accordance with section 1350 of this title on behalf of a missing participant shall satisfy this subparagraph with respect to such participant.

(B) Certification to the corporation of final distribution of assets

Within 30 days after the final distribution of assets is completed pursuant to the standard termination of the plan under this subsection, the plan administrator shall send a notice to the corporation certifying that the assets of the plan have been distributed in accordance with the provisions of subparagraph (A) so as to pay all benefit liabilities under the plan.

* * * *

29 C.F.R. § 4041.28

Sec. 4041.28. Closeout of plan.

* * * *

(c) Method of distribution—(1) In general. The plan administrator must, in accordance with all applicable requirements under the Code and ERISA, distribute plan assets in satisfaction of all plan benefits by purchase of an irrevocable commitment from an insurer or in another permitted form.

* * * *